

D.P.U. 92-DS-1

Adjudicatory hearing in the matter of a possible violation of G.L. Chapter 82, Section 40, by Aldo Ruscito.

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APPEARANCES: Paul E. Kennedy, Esq.  
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16 Billings Street  
Sharon, Massachusetts 02067  
FOR: ALDO RUSCITO  
Respondent

Gail Soares, Dig-Safe Investigator  
Division of Pipeline Engineering and Safety  
Department of Public Utilities  
Boston, Massachusetts 02202  
FOR: THE DIVISION OF PIPELINE  
ENGINEERING AND SAFETY

## I. INTRODUCTION

On May 22, 1992, the Pipeline Safety and Engineering Division ("Division") of the Department of Public Utilities ("Department") sent Aldo Ruscito ("Respondent") a Notice of Probable Violation ("NOPV"), which stated that the Division had reason to believe that the Respondent performed excavations on April 29, 1992, on Jamie Lane, Stoughton, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to tender proper notification to the underground utility operators, and allegedly failed to exercise reasonable precautions, causing damage to the underground service line operated by Eastern Edison Company ("Eastern Edison" or "Company"). The NOPV also stated that the Respondent had the right to either appear before a Department hearing officer in an informal conference, or send a written reply to the Department by that date.

On June 23, 1992, the Respondent appeared before a Department hearing officer in an informal conference. In a letter dated July 16, 1992, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of his right to request an adjudicatory hearing.

On July 23, 1992, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). After due notice, an adjudicatory hearing was held on July 6, 1994. The Division, which was represented by Gail Soares, a Dig-Safe investigator, presented twelve exhibits and sponsored the testimony of two witnesses: William Cummings, Dig Safe Coordinator for the Company, and Terrance McManus, supervisor of maps and records for the Company. The Respondent testified on his own behalf.

## II. SUMMARY OF FACTS

### A. The Division

The Division alleged that the Respondent failed to provide a reasonable description of the excavation site and failed to take reasonable precautions to protect underground facilities during its excavation. Mr. Cummings testified that he personally marked the area requested by the Respondent<sup>1</sup> on April 22, 1992 (Tr. at 11). Mr. Cummings indicated that he understood the area "across from house 97" to be the area in front of lot 10 (id. at 13). Mr. Cummings testified that he spoke with Mr. Ruscito at the site, and even though the description of the area to be marked was "across from house 97," the Respondent was pointing in a direction beyond lot 10 (id. at 12-14, 19). Subsequently, Mr. Cummings testified that he marked lot 10 and also marked beyond lot 10, into lots 9 and 11 (Exh. Div-7; Tr. at 13-14, 19, 27, 29).

Mr. Cummings stated that he used three methods to mark the underground cable: flags, a small line in the middle with two outside marks, and paint (Tr. at 33, 36). Furthermore, Mr. Cummings and Mr. McManus both testified that the method of finding and marking the cable was very accurate (id. at 42-45, 57-60).

On April 29, 1992, the Company was notified through Dig Safe that an electrical cable had

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<sup>1</sup> Due to the Respondent's heavy Italian accent, he asked a neighbor, Diane Souza, to make the call to Dig Safe Inc. ("Dig-Safe") on April 22, 1992 (Exh. Div-6; Tr. at 19). Dig-Safe is a non-profit organization that exists for the express purpose of gathering information on proposed excavations from excavators, and disseminating that information to utility companies, including natural gas pipeline companies, public utility companies, cable television companies, or telephone companies, so that they can properly mark their underground facilities before excavation begins. See G.L. c. 164, § 76D.

been damaged (Exh. Div-1; Tr. at 11). Mr. Cummings stated that when he arrived at the site, approximately one-half hour after the call from Dig-Safe, he noted that the Respondent had damaged an 8,000 volt underground primary cable, causing an outage, through the use of a large backhoe (Exh. Div-8; Tr. at 11, 14, 31). When asked what the distance was between the line of flags<sup>2</sup> and the original location<sup>3</sup> of the damaged cable, Mr. Cummings replied that it was approximately six to eight inches (Tr. at 35-36). Consequently, Mr. Cummings cited the Respondent with not using caution while digging near marked underground cables (id. at 11-12). Furthermore, Mr. Cummings stated that the prudent way to excavate in that area, since there was no conduit, would have been to hand dig (id. at 15-16).

B. The Respondent

Mr. Ruscito testified that due to his heavy Italian accent, he asked a neighbor, Diana Souza, to call the Dig-Safe Center (Exh. Div-6; Tr. at 47). Mr. Ruscito testified that on the day of the incident he was operating the backhoe (Tr. at 48). Mr. Ruscito confirmed that he did see the center line markings and added that he was digging approximately four feet away from those marks and eleven feet from the street curve (id. at 49-50). He added that when the backhoe damaged the cable, he did not pull the cable (id. at 53). Since the Respondent was using a large

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<sup>2</sup> The line of flags was intended to be placed at the center line, thus leaving an 18-inch clearance on either side for the cable (Tr. at 36).

<sup>3</sup> Mr. Cummings testified that when the Respondent snagged the cable, he moved it farther away from the line of flags, approximately 6 to 8 inches, thus making the distance from the line of flags and the cable appear to be farther in the pictures (Exh. Div-10; Tr. at 39, 67-68).

backhoe, he stated that he only scratched the cable because if he had snagged it enough to pull it, the cable would have broken (id.). The Respondent then stated that the cable was improperly marked because he was not excavating near (within 18-inches) of the markings when his backhoe scratched the cable (id. at 51, 53).

### III. STANDARD OF REVIEW

G.L. c. 82, § 40 states in pertinent part:

No person shall ... contract for, or make an excavation ... unless at least seventy-two hours, exclusive of Saturdays, Sundays and legal holidays, but not more than thirty days, before the proposed excavation is to be made such person has given an initial notice in writing of the proposed excavation to such natural gas pipeline companies, public utility companies, cable television companies and municipal utility departments as supply gas, electricity, telephone or cable television service in or to the city or town where such excavation is to be made. Such notice shall set forth the name of the street or the route number of said way and a reasonably accurate description of the location in said way or on private property the excavation is to be made ...

The Department has held that a contractor's notice must adequately name the street of the proposed excavation, and give a reasonably accurate description of the location where the excavation is to be made. D.F. Callahan, Inc., D.P.U. 90-DS-50 (1993); Weston Geophysical Corporation, D.P.U. 89-DS-115 (1993). The statute assigns to the company the responsibility to mark the location of its facilities in the area of the proposed excavation.

In Silversmith, D.P.U. 89-DS-111 (1993), an excavator's description of an area to be excavated was considered "reasonable" by the Department where the excavation occurred within the boundaries of, and on the side of the street closest to, the address requested to be marked by the Respondent. However, in D.F. Callahan, Inc., D.P.U. 90-DS-50 (1993), the excavator's

notice was considered "unreasonable" by the Department because the excavation took place across the street from the address requested to be marked by the excavator. The Department added that "[a]lthough companies may occasionally mark facilities across streets to increase safety, they are not obligated to do so under the Dig-Safe Law." D.F. Callahan, Inc., D.P.U. 90-DS-50 (1993).

In regard to the use of reasonable precautions, G.L. c. 82 § 40 also states:

Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to the pipes, mains, wires or conduits in use under the surface of said public way . . . including, but not limited to, any substantial weakening or structural or lateral support of such pipe, main, wire, or conduit, penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in the Dig-Safe area. Several cases have established the proposition that using a machine to expose utilities, rather than hand-digging, constitutes a failure to exercise reasonable precautions. See Petricca Construction Co., D.P.U. 88-DS-31 (1990); John Mahoney Construction Co., D.P.U. 88-DS-45 (1990); Northern Foundations, Inc., D.P.U. 87-DS-54 (1990).

In order for the Department to construct a case justly against an alleged violator of the Dig-Safe law for a failure to exercise reasonable precautions, adequate support or evidence must accompany that allegation. New England Excavating, D.P.U. 89-DS-116, at 9 (1993); Fed. Corp., D.P.U. 91-DS-2, at 5-6 (1992). In addition, the mere fact that a facility was damaged during an excavation does not by itself constitute a violation of the statute. Yukna v. Boston Gas

Co., 1 Mass. App. Ct. 62 (1973). In specific instances where there has been an allegation of failure to exercise reasonable precautions without demonstrating any precautions the excavator could or should have taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Umbro and Sons Construction Co., D.P.U. 91-DS-4 (1992); Fed. Corp., D.P.U. 91-DS-2 (1992); Albanese Brothers, Inc., D.P.U. 88-AD-7 (1990).

#### IV. ANALYSIS AND FINDINGS

The issues to be decided in this case are whether the excavator failed to render proper notification before excavation and whether the excavator used reasonable precautions.

With respect to the notification issue, the Respondent is required to provide a reasonably accurate description of the excavation site. The Respondent testified that he had a neighbor call Dig-Safe and request that the area "across from house 97" be marked. The Division presented a copy of the Dig-Safe ticket which contained the Respondent's aforementioned request. The Company testified that according to the Dig-Safe description, it intended to only mark lot 10, but instead marked lots 9, 10 and 11 after speaking with the Respondent personally at the site. The damage occurred in lot 11, an area marked by the Company but outside of the Dig-Safe notification area.<sup>4</sup>

The Department finds that the Respondent failed to provide proper notification to Dig-

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<sup>4</sup> The Department cautions the Company against doing this because it may give the excavator a false sense of security that the area is marked for all utilities.

Safe of the entire area to be marked. It is the duty of the Respondent to indicate properly to Dig-Safe the area in which he will be working. This must be done so that Dig-Safe can notify all of the companies that have underground utilities of the need to mark the area. In this case, even though the Company did mark the area that was damaged, there could have been other utilities that had underground utilities within lots 9 and 11 which were not notified due to the Respondent's improper notification to Dig-Safe.<sup>5</sup>

With respect to whether reasonable precautions were taken by the excavator, the central question is, how far was excavation taking place from the flags which marked the center line. If excavation was taking place within the 18-inch<sup>6</sup> clearance, then the Respondent, in using a large backhoe, was not exercising reasonable precautions. On the other hand, if the excavation was taking place outside of the 18-inch clearance, then the Respondent cannot be held to have been acting unreasonably.

The Respondent claims that he was excavating four feet from the marking flags. The Department claims that the excavating took place within six to eight inches from the flags. The

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<sup>5</sup> Proper notification is legally required whether or not damage results. G.L. c. 82 §40 provides in pertinent part that "[s]uch notice shall set forth the name of the street or the route number of said way and a reasonably accurate description of the location . . . [where] the excavation is to be made . . . [a]ny person, contractor or company found by the department of public utilities, after a hearing, to have violated any provision of this section shall forfeit to the commonwealth the sum of two hundred dollars for the first offense . . . ." (emphasis added).

<sup>6</sup> See fn. 2 *supra*.



only evidence that was presented to aid in resolving this conflict was several pictures of the site, taken by the Company (Exhs. Div-8; 9; 10). These pictures, on their face, do not support the Department's contention because they did not contain any reference distance markers.<sup>7</sup> Therefore, because the Department's evidence does not provide adequate support for its allegations of a failure to use reasonable precautions, we cannot find the Respondent to be in violation of the Dig-Safe law on this issue.

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<sup>7</sup> An example of a reference distance marker is a ruler or a soda bottle, or any other object with a known size that, when placed near the excavator's hole or the center line markers, would give an indication of distance.

V. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That Aldo Ruscito violated the Dig-Safe Law, due to his failure to provide proper notification of his excavation, during which his backhoe damaged the underground electric cable in the area of 97 Jamie Lane, Hyde Park, Massachusetts, and it is

ORDERED: That Aldo Ruscito, being a violator of the Dig-Safe Law, shall pay a civil penalty of \$200 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within 30 days of the date of this Order.

By Order of the Department,

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Kenneth Gordon, Chairman

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Mary Clark Webster, Commissioner

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Janet Gail Besser, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).